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No. 91-__

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1991

DONAL CAMPBELL,

Petitioner,

v.

LENORA DAUGHERTY,

Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

For purposes of qualified immunity, can a court of appeals, in the absence of controlling precedent, rely upon other circuit court decisions in order to determine that the law is clearly established such that a reasonable public official would understand that his or her actions violate a constitutional right?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Donal Campbell and the respondent, Lenora Daugherty. The following individuals are defendants in the district court but did not participate as appellants or appellees in the Sixth Circuit: Alton R. Hesson, Brenda G. Funderburk, Rita A. Starbuck, Kevin W. Daniels and Bobby L. Chessor. Accordingly, these individuals are not named as parties in this petition.

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PETITION FOR WRIT OF CERTIORARI

The petitioner urges that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 10, 1991 along with the denial of the petition to rehear that opinion entered on August 27, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 935 F.2d 780 (6th Cir. 1991) and is also set forth in the appendix to this petition at 1A - 19A.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the respondent brought this suit in the Eastern District of Tennessee. On June 14, 1988, the Eastern District denied the petitioner's motion for judgment on the pleading. Since the motion was based upon qualified immunity, an appeal was taken from the order as final to the Sixth Circuit by the petitioner on July 14, 1989 pursuant to 28 U.S.C. § 1291.

The Sixth Circuit affirmed the district court on June 10, 1991 and denied the petition for rehearing on August 27, 1991. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Since the question presented for review pertains to qualified immunity of public officials, there is no statute directly involved in this appeal.

STATEMENT OF THE CASE

This case concerns the standard to be used in determining whether the law was clearly established in Tennessee that a prison official must have reasonable suspicion in order to conduct a visual body cavity search of an individual seeking to visit an inmate at a prison. Since the issue of qualified immunity was raised in this case upon a motion for judgment on the pleadings, the facts in this record are sparse. Therefore, the petitioner relies upon the facts alleged in the complaint for purposes of asserting the qualified immunity defense only and does not make a general admission of those facts.

On September 30, 1986, Lenora Daugherty began her visits with her husband, an inmate at Turner Center Correctional Facility (Turner Center), and continued those visits until January 16, 1988. These visits were contact visits in that Ms. Daugherty was permitted to have physical contact with her husband. At some point in time prior to Ms. Daugherty's planned visit of January 16, 1988, Donal Campbell, the Warden at Turner Center, ordered correctional officers at the prison to conduct a search of Ms. Daugherty's vehicle and to conduct a visual body cavity search of her person for possession of narcotics prior to any visit with her husband.

When Ms. Daugherty arrived on the prison grounds, Rita A. Starbuck, a nurse at Turney Center, conducted a visual body cavity search of Ms. Daugherty. After the search of Ms. Daugherty's person, there was another search of her vehicle which had been delayed due to the fact that her keys had been locked in the trunk of her vehicle. No illegal contraband was found on either Ms.

Daugherty or her vehicle. Suit for violation of her Fourth Amendment rights under 42 U.S.C. § 1983 was filed by Ms. Daugherty against Warden Campbell and other prison employees on June 8, 1988.

A motion for judgment on the pleadings was filed by Warden Campbell on October 28, 1988. That motion asserted qualified immunity on behalf of Warden Campbell contending that it was not clearly established law in Tennessee that reasonable suspicion was required prior to visual body cavity searches of individuals seeking contact visits with inmates at prisons. The district court denied the motion on June 14, 1989.

The appeal to the United States Court of Appeals for the Sixth Circuit by Warden Campbell was ultimately unsuccessful. In a 2-1 opinion dated June 10, 1991, the majority concluded that in January, 1988 the law was clearly established that reasonable suspicion was necessary before a search could be conducted of prison visitors. To reach this conclusion, the majority relied upon three other circuit decisions including *Hunter v. Auger*, 672 F.2d 688 (8th Cir. 1982); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); and *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985).

REASONS FOR GRANTING THE WRIT

- I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER NONBINDING CIRCUIT DECISIONS MAY BE USED IN DETERMINING THAT THE LAW IS CLEARLY ESTABLISHED FOR PURPOSES OF QUALIFIED IMMUNITY FOR PUBLIC OFFICIALS.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court established the objective test for qualified immunity for public officials from money damages stating that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." This test was refined in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) to the effect that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

This Court has not addressed the question of what case law may be used in determining whether the law is clearly established at the time the action occurred. In *Harlow*, this Court, in quoting *Procunier v. Navarette*, 434 U.S. 555 (1978), stated that "[w]e need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the courts of appeals, or of the local district court.'" *Harlow*, 457 U.S. at 818 n.32. See also *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) ("The Supreme Court has failed to clarify whether only its pronouncement can clearly establish a constitutional right or whether lower court decisions will operate to the same affect."); *Hobson*

v. Wilson, 737 F.2d 1, 25-26 (D.C. Cir. 1984) ("It is not clear, for example, how a court should determine well-established rights; should our reference point be the opinions of the Supreme Court, the courts of appeals, district courts, the state courts or all of the forgoing?")

Since this Court has not articulated any type of standard as to which decisions a court of appeals may rely in determining whether the law is clearly established, different circuits have developed inconsistent and conflicting standards. The First, Fourth and Tenth Circuits have not relied upon other circuit decisions in the absence of controlling precedent in determining whether the law is clearly established. In *Knight v. Mills*, 836 F.2d 659, 668 (1st Cir. 1987), the First Circuit, in refusing to consider three other circuit court decisions on the right of a psychiatric patient to receive individualized psychiatric treatment, stated that "even if we assume that these cases could not be distinguished from this case before us, it is nevertheless clear that these cases are not binding on this court."

Likewise, in *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980), the Fourth Circuit held that law enforcement officers should not be personally liable for monetary damages "where the controlling law had not been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state. . . ." (emphasis added) Finally, in *Hilliard v. City and County of Denver*, 930 F.2d 1516, 1520 (10th Cir. 1990), the Tenth Circuit held that the existence of two other circuit decisions did not "clearly establish" the law in that case.

Besides the Sixth Circuit, the Seventh and Ninth Circuits have relied upon other circuit decisions in the absence in controlling precedent to determine that the law was clearly established on a particular point for purposes of qualified immunity for public officials. In *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989), the Eighth Circuit rejected an argument that only decisions rendered by the particular circuit or another court with direct jurisdiction over the defendant could clearly establish the law stating that "while the identity of a court and its geographical proximity may be relevant in determining whether a reasonable official would be aware of the law . . . , we do not think the defendants' *per se* rule adequately captures what the Supreme Court has meant by its objective test for what is clearly established." *Id.* at 1049. Moreover, in *Cleveland-Purdue v. Burtsche*, 881 F.2d 427 (7th Cir. 1989), the Seventh Circuit stated that where there is no controlling precedent, the court would "seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Id.* at 431.

There is little doubt that the circuits will continue to develop inconsistent and conflicting standards with respect to what case law may be used in determining when the law is clearly established for purposes of qualified immunity for public officials. The conflict among the circuits is apparent.¹ Accordingly, this Court should grant the petition for writ of certiorari.

¹ Indeed, the Sixth Circuit has itself rendered inconsistent decisions as to whether other circuit decisions may be

II. THIS CASE RAISES A SIGNIFICANT ISSUE OF NATIONAL IMPORTANCE FOR ALL PUBLIC OFFICIALS AS TO WHAT CASE LAW SUCH OFFICIALS MUST BE AWARE IN THEIR DAY-TO-DAY ACTIONS.

The significance of this case does not concern the standard to be used in conducting visual body cavity searches of individuals seeking to visit inmates at a prison which the Sixth Circuit determined to be "reasonable suspicion". Rather, this case is important because it concerns what case law the circuit courts may use in determining whether a right has been clearly established such that a reasonable prison warden in the shoes of the defendant would have recognized that his or her actions would violate Ms. Daugherty's constitutional rights.

Just how much legal research are public officials, who are not lawyers, required to do before they may act on a day-to-day basis. Public officials at the federal, state and local levels should not be required to determine "a clear trend in the case law" from other circuit courts as required by the Seventh Circuit in the *Brutsche* case when

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considered where there is no binding precedent by this Court. In *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171 (6th Cir. 1988), the Sixth Circuit noted that in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent. Only in the extraordinary case when the decisions of other courts "point unmistakably to the unconstitutionality of the conduct complained and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable [state official] that his conduct . . . would be found wanting." *Id.* at 1177-78.

there is no clear precedent from this Court or in the district within which the public official lives. This position is best stated by Judge Nelson in his dissent in this case:

I have little doubt that most legal scholars, if asked in January of 1988 to predict whether the Sixth Circuit would take the same view would have answered in the affirmative. But ordinarily, at least, prison wardens are not legal scholars. Like many other officials charged with responsibility for the difficult nuts-and-bolts work of preserving domestic tranquility, prison wardens do not normally enjoy the advantages of a law school education and the leisure to ponder the advance sheets and speculate on how the law may or may not develop in the different circuits.

Daugherty v. Campbell, 935 F.2d at 788 (Nelson, J., dissenting). See also *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982), cert. denied 460 U.S. 1012 (1983) ("Certainly we cannot expect our police officers to carry surveying equipment and a Decennial Digest on patrol.")

There is no dispute that in this particular case, the Sixth Circuit "look[ed] to the case law from other circuits" to "clearly establish the right of prisoners to be free from . . . a visual body cavity search unless the prison official first finds a reasonable suspicion that contraband is being concealed."² *Daugherty v. Campbell*, 935 F.2d at

² The majority in this case placed partial reliance upon the case of *Long v. Norris*, 929 F.2d 1111 (6th Cir. 1991). However, it is impossible to conceive how the *Long* decision could aid the Court in determining that the law on the point in question in this case was clearly established in January 1988 when the *Long* case was not decided until this year.

785. Specifically, the Sixth Circuit relied upon decisions of the Eighth, First and Fifth Circuits in determining the law to be clearly established on this issue. See *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985).

Each of these circuit decisions were rendered prior to January, 1988. However, this Court in *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) upheld the practice of conducting routine body cavity searches of inmates following contact visits against a Fourth Amendment challenge even though there had been only one reported attempt to smuggle contraband into the facility in a body cavity. See also *Block v. Rutherford*, 468 U.S. 576, 588-89 (1984) ("We can take judicial notice that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country.")

Thus, in January 1988, Warden Campbell was faced with a maze of legal decisions indicating on the one hand that reasonable suspicion was unnecessary to conduct visual body cavity searches of inmates after contact visits; but on the other hand, there were nonbinding circuit decisions holding that reasonable suspicion was necessary to conduct such searches upon individuals seeking contact visits with inmates. It is difficult to conceive that in the mind of a reasonable prison warden that the law was clearly established in the Sixth Circuit in January, 1988 such that Warden Campbell's actions violated Ms. Daugherty's constitutional rights.

CONCLUSION

Based upon the foregoing authorities and analysis, the petitioner urges this Court to grant his petition for writ of certiorari.

Respectfully submitted,

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No. 89-6008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LENORA DAUGHERTY,)	
<i>Plaintiff-Appellee</i>)	
<i>v.</i>)	
)	
DONAL CAMPBELL,)	ON APPEAL from the
<i>Defendant-Appellant,</i>)	United States District
)	Court for the Middle
ALTON R. HESSON, ROBERT W.)	District of Tennessee
STARBUCK, FUNDERBURK, RITA A.)	
STARBUCK, KEVIN W. DANIELS,)	
BOBBY L. CHESSOR,)	
<i>Defendants.</i>)	

Decided and filed June 10, 1991

Before: KEITH and NELSON, Circuit Judges; and
PECK, Senior Circuit Judge.

KEITH, Circuit Judge, delivered the opinion of the court, in which PECK, Senior Circuit Judge joined. NELSON, Circuit Judge (pp. 15-19) delivered a separate dissenting opinion.

KEITH, Circuit Judge. Defendant Donal Campbell ("Campbell") appeals from the district court's June 14, 1989, order denying summary judgment on the basis of qualified immunity in this action alleging violations of 42

U.S.C. § 1983, the fourth amendment and the fourteenth amendment. For the reasons set forth below, we AFFIRM the district court's order.

I.

A.

In 1982, the Tennessee Department of Corrections (the "Department") established guidelines governing the search of visitors to penal institutions (the "guidelines"). The Department's search policy required any official authorizing a visual body cavity search¹ of a visitor to make an affirmative finding of probable cause to believe that the visitor is concealing contraband prior to conducting the search.² On July 22, 1986, Campbell, who was

¹ The term "strip search" generally refers to an inspection of a naked individual without scrutinizing the subject's body cavities. The term "visual body cavity search" refers to a visual inspection of a naked individual that includes the anal and genital areas. The term "manual body cavity search" refers to an inspection of a naked individual with some degree of touching or probing the body cavities. See *Blackburn v. Snow*, 771 F.2d 556, 561 & n.3 (1st Cir. 1985).

² Section IV.B. of the Department's guidelines provides in pertinent part:

IV. Policy:

B. Strip, visual body cavity, and/or manual body cavity searches of the persons of visitors and employees may only be conducted when they are specifically authorized as per the requirements of this policy regarding a particular person and shall

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warden of the Turney Center Correctional Facility (the "Facility"), personally approved the Department's 1982 guidelines. Specifically, Campbell adopted the standard

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only be authorized when there is *probable cause* to believe the person is concealing contraband. (Emphasis added).

Section V.A.5. of the Department's guidelines provides in pertinent part:

V. *Procedures:*

A. *Searching Visitors:*

5. In determining probable cause to the extent which warrants that a strip search, visual body cavity search, or a manual body cavity search be performed, the following factors should be first determined:

a. Source of information:

1. Received from outside Law Enforcement Agency.

2. Received from other Correctional Institutions.

3. Turney Center Staff

4. Informant information, whether it be from free world informants or inmates informants, should be evaluated for credibility, utilizing the following criteria:

a. Credibility – Has informant's previous information been reliable? If so, how often?

b. Motive – What is informant attempting to gain by divulging information?

Appellee's Brief at Addendum B.

that a finding of probable cause must be made before a visual body cavity search of a prison visitor may be conducted.

Plaintiff Lenora Daugherty ("Daugherty") makes the following allegation in her pleadings.³ On January 16, 1988, Campbell ordered security personnel at the Facility's visitors annex to conduct a visual body cavity search of her before permitting her to visit her husband. When Daugherty arrived at the Facility, two security guards instructed her that they were ordered to conduct a search of her vehicle as a precondition to granting her permission to visit her husband. The security officers initially were unable to search the vehicle because Daugherty had inadvertently locked her keys in the vehicle. The security officers then instructed Daugherty to enter the annex and submit to a visual body cavity search by another officer. Daugherty complied and the visual body cavity search failed to produce contraband.

After the visual body cavity search, the security officers reinstated their request to search the vehicle before permitting Daugherty to proceed with her visit. Daugherty obtained entry of the vehicle by breaking the driver's side window. The security officers conducted a search of the vehicle which failed to produce contraband.

Next, Daugherty was instructed that permission to visit her husband was conditioned upon obtaining her signature on a standardized form indicating that she had

³ For the limited purpose of reviewing the district court's denial of the motion for summary judgment, we will state the facts as alleged by plaintiff, the nonmoving party.

consented to the vehicle and visual body cavity searches before they were conducted. Daugherty complied with this requirement.

B.

On June 8, 1988, Daugherty filed suit against Campbell and several other prison officials. With respect to Campbell, Daugherty's complaint alleged that he ordered a visual body cavity search of her without first finding probable cause of reasonable suspicion that she possessed contraband. Daugherty claimed that Campbell's actions violated her rights under 42 U.S.C. § 1983 and the fourth and fourteenth amendments of the United States Constitution. On October 28, 1988, Campbell filed a motion for judgment on the pleadings and a stay of discovery. In its November 29, 1988, order, the district court referred all pretrial matters to a magistrate pursuant to 28 U.S.C. § 636(b)(1)(A) and (B). In considering Campbell's motion, the magistrate reviewed the guidelines governing the search of visitors to penal institutions. These guidelines constitute evidence outside the pleadings, therefore, the defendant's motion was treated as a motion for summary judgment. After finding that, as a prison visitor, Daugherty had a clearly established fourth amendment right to be free of any search of her person absent a finding of reasonable suspicion by a prison official, the magistrate recommended denial of Campbell's motion for summary judgment on the issue of qualified immunity. The magistrate noted that the higher standard of probable cause, set forth in the guidelines, is not the proper legal standard to evaluate Campbell's conduct because Daugherty did not argue that the regulations created a

fourth amendment liberty interest which was denied without due process.

The district court adopted the magistrate's report and recommendation on June 15, 1989 and denied Campbell qualified immunity with respect to the strip search issue. On July 14, 1989, Campbell filed a timely notice of appeal.

II.

Although Campbell's appeal is interlocutory, we derive our jurisdiction to review the district court's order from 28 U.S.C. § 1291 which conveys appellate jurisdiction over appeals from "final decisions." "[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Under the "collateral order" doctrine, a final decision under § 1291 may not be the last possible order made in a case. *Id.* at 524 (citation omitted). If the nature of the district court's decision is such that deferring appellate review to the conclusion of the proceedings would render the decision unreviewable, then § 1291 vests this court with jurisdiction to review the decision. *Id.* at 525, 527. Qualified immunity entitles its possessor to "immunity from suit rather than a mere defense to liability." *Id.* at 526 (original emphasis). The district court's decision to deny qualified immunity, like absolute immunity, is effectively unreviewable at the conclusion of the proceedings. *Id.* at 527.

The district court's denial of Campbell's claim of qualified immunity is therefore a final decision that is appealable at this juncture.

Whether qualified immunity is applicable to an official's actions is a question of law. *See id.* at 530; *see also Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988). We therefore apply a de novo standard of review to this question. *Long v. Jones*, Nos. 89-5377/5378/5379, slip op. at 5 (6th Cir. Apr. 3, 1991).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Reiterating the objective test, the Supreme Court stated in *Davis v. Scherer*, 468 U.S. 183 (1984):

Harlow v. Fitzgerald rejected the inquiry into state of mind in favor of a wholly objective standard. . . . Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." No other "circumstances" are relevant to the issue of qualified immunity.

Id. at 191 (citations omitted). Before the commencement of discovery, a defendant pleading qualified immunity is entitled to dismissal if the plaintiff fails to state a claim of violation of clearly established law. *Mitchell*, 472 U.S. at 526. In using objective terms to define the limits of qualified immunity, the *Harlow* Court found that it is the

district court's duty to determine, on a motion for summary judgment, the currently applicable law *and* whether that law was clearly established at the time the alleged action occurred. *Harlow*, 457 U.S. at 818. If the law was not clearly established, it is impossible to find that the defendant knew that the law forbade his or her conduct. *Id.* Under such circumstances, it is unreasonable to expect an official to anticipate subsequent legal developments. *Id.* Government officials, therefore, are shielded from civil damages liability when "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In determining whether the law was clearly established at the time of the official's action, the *Anderson* Court advises:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful (citation omitted), but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640. When conducting an inquiry to determine whether a constitutional right is clearly established, the law of our circuit requires us to look first to decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to the decisions of other circuits. *Masters v. Crouch*, 872 F.2d

1248, 1251-52 (6th Cir. 1989). In *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171 (6th Cir. 1988), we stated:

[I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decision of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.

Id. at 1177. *Seiter* found that the law was not clearly established regarding the relevant right. An examination of *Seiter* aids in clarifying the "contextual similarity required for the finding of a clearly established right." *Seiter*, 858 F.2d at 1176.

Seiter involved a challenge to Ohio prison officials' practice of conducting strip and body cavity searches on prison employees. The Ohio prison officials claimed that they were entitled to qualified immunity because the fourth amendment right to be free of the searches was not clearly established at the time of the officials' actions. The district court denied the officials' claim of qualified immunity based on *Katz v. United States*, 389 U.S. 347 (1967). The district court reasoned that *Katz* provides a per se rule of unlawfulness of any warrantless search that does not fall within an articulated exception to the warrant requirement. Although neither the Supreme Court

nor the [sic] this Circuit had ruled on the specific circumstances of strip and body cavity searches, the district court held that the existence of the per se rule clearly established that such searches were violative of the fourth amendment. This Court reversed the district court's ruling finding the link between the conduct in *Katz*, wiretapping, and the conduct in *Seiter*, strip and body cavity searches of prison employees, was so attenuated that *Katz* failed to provide "an authoritative, 'clearly established' rule forewarning the defendants . . . on pain of personal liability." *Seiter*, 858 F.2d at 1177. In addition, the *Seiter* court found that the prison visitor cases were not "so sufficiently similar as to merit reasonable reliance upon them as a guide to proper conduct." *Id.*

Bearing the aforementioned principles in mind, we conclude that the district court properly denied Campbell's claim of qualified immunity because in January 1988 the search of prison visitors without at least reasonable suspicion violated clearly established law. In *Long v. Jones*, Nos. 89-5377/5378/5379, slip opinion (6th Cir. 1991), we were confronted with a similar issue. The defendants in *Long* were wardens who, during 1984 and 1985, authorized strip searches or body cavity searches of the prison visitors. Much like Daugherty's experience, the prison guards told the visitors that they would not be allowed to visit their husbands or fiances unless the visitors submitted to the searches. *Id.* at 3. The visitors and their inmate-spouses or -fiances filed suit. The visitors alleged that the searches violated their fourth amendment rights to freedom from unreasonable searches and seizures. The inmates alleged that the wardens violated the inmates' fourteenth amendment liberty

interest in visitation created by Tennessee prison regulations. The prison regulations provided that visiting rights could be suspended only for good cause. The regulations also required a prison official to have probable cause to believe that a prison visitor is concealing contraband before a strip search or a visual or manual body cavity search of the prison visitor could be authorized.

The wardens filed a motion to dismiss on the basis of qualified immunity. They claimed that they had a reasonable suspicion that the plaintiffs were smuggling contraband. They maintained that they did not violate clearly established law by conducting the search of the visitors based on their suspicion. The district court denied the motion to dismiss based on qualified immunity.

The *Long* court reversed the district court's denial of qualified immunity on the fourth amendment issue finding the "searches of prison visitors during 1984 and 1985 without *at least a reasonable suspicion* violated clearly established law, because a reasonable officer should have known that such searches would be found unconstitutional." *Long*, slip op. at 9 (emphasis added). The *Long* plaintiffs, however, alleged only that the wardens lacked *probable cause* for their searches, not that the wardens lacked reasonable suspicion. *Id.* The plaintiffs, therefore, failed to plead a cause of action under the fourth amendment that could obfuscate the wardens' claim of qualified immunity because the asserted right of prison visitors to be free from strip and body cavity searches without

probable cause was not clearly established under the fourth amendment.⁴

The plaintiffs in *Long* invoked the higher probable cause standard. In the instant case, however, Daugherty's claimed violation is based on Campbell's authorization of a visual body cavity search without first finding either *reasonable suspicion* or probable cause that she was concealing contraband. *Long*, in dicta, supports the district court's denial of Campbell's qualified immunity claim; we, therefore, add to the admittedly sparse case law in this Circuit regarding the extent of protection the fourth amendment affords prison visitors. In doing so, we look to the case law from other circuits which clearly establishes the right of prison visitors to be free from the embarrassment and humiliation of a visual body cavity search unless the prison official first finds a reasonable suspicion that contraband is being concealed.

Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982), is the first federal appellate decision to hold that the fourth amendment requires that a reasonable suspicion standard govern strip searches of visitors to penal institutions. *Id.* at 670. In *Hunter*, prison visitors brought an action against prison officials who, based on the receipt of anonymous information that the visitors would attempt to smuggle

⁴ The *Long* court, however, found that the inmate plaintiffs had pled a cause of action under the fourteenth amendment. The court reasoned that the mandatory language of the prison regulations created liberty entitlements for the inmates. *Long*, slip op. at 10-11. Since the liberty interest was clearly established, the prison officials were required to meet the fundamental requirements of due process before violating that interest. *Id.* at 12.

drugs during their visits, required the visitors to submit to a strip search before being permitted to visit. The *Hunter* court weighed the interest of correctional officials in securing the penal institution against the intrusion of personal privacy incident to a strip search and concluded that the strip search of a particular visitor is justified under the reasonable suspicion standard if the prison officials have "specific objective facts and rational inferences" that support the suspicion that a visitor will attempt to smuggle contraband into the prison. *Id.* at 674. *Hunter* further determined that the reasonable suspicion standard requires individualized suspicion directed at the visitor targeted for the strip search. *Id.* at 675.⁵

The First Circuit, in *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), found that a policy requiring all prison visitors to be strip searched, "without any predicate requirement of individualized suspicion or showing of

⁵ In 1985, the Eighth Circuit reiterated that reasonable suspicion governed strip searches of prison visitors. *Smothers v. Gibson*, 778 F.2d 470, 472 (8th Cir. 1985). In *Smothers*, a prison visitor was required to submit to a strip search before being permitted to visit her inmate son. The assistant warden claimed that he had received an informant's tip that the plaintiff would be bringing drugs into the prison.

The *Smothers* court found that the facts and circumstances giving rise to the search did not meet the reasonable suspicion standard because the record did not contain any information regarding the nature of the tip, the reliability of the informant, or the degree of corroboration. The court, therefore, rejected the prison officials' claim that they were entitled to qualified immunity because the reasonable suspicion standard was not clearly established in December 1981 or January 1982 when the search occurred.

special and highly unusual institutional need," violated the fourth amendment. *Id.* at 562. The *Blackburn* court reasoned that prison visitors retain a legitimate expectation of privacy that is diminished by the exigencies of prison security. Nevertheless, prison visitors do not "suffer a wholesale loss of rights." *Id.* at 563. The severe interference with a prison visitor's privacy that occurs during a visual body cavity search is governed by the fourth amendment. The First Circuit, therefore, concluded that absent an unusual need for special security measures, "the Constitution normally requires a more particularized level of suspicion before individuals wishing to visit a jail may permissibly be subject to a grossly invasive body search." *Id.* at 564. Thus the *Blackburn* court found that the plaintiff's fourth amendment rights had been violated by the visual body cavity search which was conducted pursuant to a policy requiring all prison visitors to be searched.

The *Blackburn* court further denied the prison official qualified immunity stating, "[i]t can hardly be debated that *Blackburn* had, in 1977, a 'clearly established' Fourth Amendment right to be free from unreasonable searches. No court had intimated then, as no court has intimated today, that citizens who visit a penal institution forfeit the protections presumptively accorded them by the Bill of Rights." *Id.* at 569.

Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985), also addressed the standard governing the strip search of prison visitors. The relevant facts of *Thorne* are that the plaintiff was required to submit to a strip search before being permitted to visit his son in a maximum security state prison. The prison officials based their decision to

require a strip search on information received from an inmate that the plaintiff's son was regularly receiving narcotics through the visiting room.

In weighing the legitimate penological security interest against the privacy interest of prison visitors, the *Thorne* court adopted the *Hunter* reasonable suspicion standard. The Fifth Circuit concluded that the reasonableness of a visitor search must be determined in the context of all of the facts and circumstances. *Id.* at 1276. Reasonable suspicion must attach to the person being searched. Reasonable suspicion is not readily transferred solely through association with others with whom reasonable suspicion has attached. *Id.* at 1277. Since there were no objective facts pointing to the plaintiff as the source of the narcotics being smuggled, the search was violative of the fourth amendment.

The *Thorne* court, nevertheless, granted the prison officials qualified immunity because at the time of the search, the law regarding the fourth amendment rights of prison visitors was not clearly established. When the search was conducted, only one district court had ruled on this issue. See *Black v. Amico*, 387 F.Supp. 88 (W.D.N.Y. 1974). The *Thorne* court found this sole district court case insufficient to provide prison officials with a clear indication that their actions would likely result in liability.

We find *Thorne's* ruling on the qualified immunity issue distinguishable from our case. At the time of the search in *Thorne*, only one court had spoken on the legal standard required to justify a strip search of a prison visitor. In the instant case, in addition to *Black*, all circuits

that have addressed this issue have adopted the reasonable suspicion standard. *Hunter, Blackburn, Thorne* and *Smothers* point unmistakably to the unlawfulness of the conduct of the state officials under facts and circumstances virtually identical to the ones presented in this case.⁶ All of these cases had been decided before January 1988. We, therefore, conclude that in January 1988 the case law addressing the predicate requirement of reasonable suspicion for the search of prison visitors provided "an authoritative, 'clearly established' rule forewarning the defendants . . . on the pain of personal liability." See *Seiter*, 858 F.2d at 1177; see also *Long*, slip op. at 9.

We hold that the case law clearly established the contours of the prison visitor's right to be free from a visual body cavity search in the absence of reasonable suspicion that he or she is carrying contraband. The Supreme Court, in *Anderson*, indicated that our denial of qualified immunity need not be based upon a previous holding that the very action in question – a visual body cavity search of a prison visitor without a prior finding of reasonable suspicion – is unlawful. *Anderson*, 483 U.S. at 640. Yet, in the instant case, the very action in question has been held unlawful by every circuit considering the

⁶ In addition, case law involving the strip searches of individuals other than prison visitors has generally followed *Hunter's* mandate. See *Sec. & Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187 (2d Cir. 1984) (reasonable suspicion required to strip search prison guards and probable cause and a warrant required to conduct body cavity searches of prison guards); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983) (reasonable suspicion required to strip search misdemeanor arrestees confined while awaiting bail money).

issue since 1982. The prison visitor cases from other circuits are similar enough to merit reasonable reliance upon them. *See Seiter*, 858 F.2d at 1177. We, therefore, conclude that the unlawfulness of Campbell's conduct was apparent.⁷

III.

For the foregoing reasons, we **AFFIRM** the June 14, 1989, order of the Honorable John T. Nixon, United States District Judge for the Eastern District of Tennessee.

DAVID A. NELSON, Circuit Judge, dissenting. This is a close case, but I would resolve it in favor of Warden Campbell. To do otherwise, it seems to me, is to attribute greater legal acumen to Hickman County, Tennessee, officialdom than is realistic.

The question we are required to decide is whether in January of 1988 the proposition that the United States Constitution requires a finding of reasonable suspicion

⁷ We reach this holding without relying on Campbell's approval of the Department's guidelines requiring a prior finding of a higher standard – probable cause – before conducting a strip search, visual body cavity search or manual body cavity search on a prison visitor. We, nevertheless, acknowledge the case law supporting the use of regulations as a basis for clearly established law. *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985) (violation of clearly established state or administrative regulation provided sufficient proof to defeat state official's claim of qualified immunity in action alleging fourteenth amendment due process violation). While the Department's guidelines do not raise the fourth amendment's reasonable suspicion standard to probable cause, we note that a fourteenth amendment liberty interest may have been created. *Long*, slip op. at 10-11.

before prison visits can be conditioned on the visitors' agreeing to visual body cavity searches was a proposition so clearly established that any reasonable prison warden within the Sixth Circuit must be presumed to have known of it.

The proposition had never been endorsed by the United States Supreme Court. It had never been endorsed by our Sixth Circuit Court of Appeals. It had never been endorsed by the United States District Court for the Middle District of Tennessee, the district that includes the county (Hickman) where Warden Campbell's prison facility is located. And, as far as I am aware, the proposition had never been endorsed by the Supreme Court of Tennessee or any lower court of that state.

The proposition had, however, been endorsed in recent years by federal courts of appeals sitting in St. Louis, Boston and New Orleans. In two of these cases the courts refused to allow the defendant prison officials to be subjected to any significant monetary liability,⁸ but none of the three circuits in question had rejected the underlying proposition that prison visitors may not be asked to submit to searches comparable to that at issue in the case at bar without reasonable and particularized suspicion.

⁸ In *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982), which was decided before the Supreme Court's enunciation of the qualified immunity doctrine in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Eighth Circuit declared that it would not allow an award of more than nominal damages. A subsequent Eighth Circuit decision, *Smothers v. Gibson*, 778 F.2d 470 (8th Cir. 1985),

(Continued on following page)

I have little doubt that most legal scholars, if asked in January of 1988 to predict whether the Sixth Circuit would take the same view, would have answered in the affirmative.⁹ But ordinarily, at least, prison wardens are not legal scholars. Like many other officials charged with responsibility for the difficult nuts-and-bolts work of preserving domestic tranquility, prison wardens do not normally enjoy the advantages of a law school education and the leisure to ponder the advance sheets and speculate on how the law may or may not develop in the different circuits. As the Fifth Circuit put it in *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983),

"[I]f we are to measure official action against an objective standard, it must be a standard which speaks to what a reasonable officer should or should not know about the law he is enforcing and the methodology of effecting its enforcement. *Certainly we cannot expect our police officers*

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reversed a summary judgment for the defendants without imposing any such restriction. In *Thorne v. Jones*, 765 F.2d 470 (8th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), where the Fifth Circuit held that the defendant officials were entitled to prevail on qualified immunity grounds, the court noted that "in our Circuit portions of [the law in this area] become 'clearly established' only today." *Id.* at 1277. *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), upheld an award of substantial damages against the defendant officials, but Judge Bailey Aldrich, who dissented, maintained that his two colleagues on the First Circuit were committing "deep and conclusive error" in rejecting the claim of qualified immunity. *Id.* at 575.

⁹ Dicta in *Long v. Norris*, 929 F.2d 1111, 1116 (6th Cir. 1991), a case decided more than three years later, support this conclusion.

to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-searcher's knowledge of metes and bounds or a legal scholar's expertise in constitutional law." (Emphasis supplied.)

The relevant question in these qualified immunity cases is not whether a reasonable circuit judge (Bailey Aldrich, *e.g.*) or law professor could have believed the challenged conduct to be lawful; the question is whether a reasonable official in the position of the defendant could have believed it lawful. See *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), where the Court declared that "[t]he relevant question in this case . . . is . . . whether a reasonable officer could have believed [the conduct in question] to be lawful. . . ." (Emphasis supplied.) See also *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987), as quoted in *Ohio Civil Service Employees Ass'n. v. Seiter*, 858 F.2d 1171, 1174 (6th Cir. 1988), where we suggested that the issue was whether the plaintiff's rights "were so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." (Emphasis supplied.) Absent a Supreme Court or Sixth Circuit decision on point, *Seiter* teaches, the officer is entitled to qualified immunity unless the general case law is so overwhelming as to "leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." 858 F.2d at 1177. I do not read the general case law in this area as having that powerful an effect.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), as the Supreme Court noted in *Block v. Rutherford*, 468 U.S. 576, 587-88 (1984), the Court, dealing with a prison policy that required body cavity searches of all prisoners after contact with visitors,

"sustained against a Fourth Amendment challenge the practice of conducting routine body cavity searches following contact visits, even though there had been only one reported attempt to smuggle contraband into the facility in a body cavity. 441 U.S. at 558-560. The purpose of the cavity searches in *Wolfish* was to discover and deter smuggling of weapons and contraband, which was found to be a by-product of contact visits. *Given the security demands and the need to protect not only other inmates but also the facility's personnel, we did not regard full body cavity searches [without particularized suspicion] as excessive.*" (Emphasis supplied.)

Wolfish reminds us that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559. The particular search with which we are concerned here, according to the plaintiff's own complaint, was ordered by Warden Campbell to determine whether the plaintiff was in possession of narcotics. There is no allegation in the complaint that the warden acted out of personal animosity of any other ulterior motive; as far as the complaint discloses, he simply wanted to make sure that the plaintiff did not bring narcotics into the prison. "We can take judicial notice that

the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country." *Block v. Rutherford*, 468 U.S. at 588-89. The Supreme Court has repeatedly reaffirmed, moreover, "the very limited role that courts should play in the administration of detention facilities." *Id.* at 584.

If Warden Campbell did not, in fact, have reasonable grounds to suspect the plaintiff of trying to conceal narcotics on her person – and it remains to be seen, of course, whether he actually had such grounds or whether probable cause for the search actually existed – the probable cause obviously made a mistake in ordering that the plaintiff be subjected to a body cavity search. It would have been a mistake regardless of any constitutional considerations, because the applicable regulations permitted such searches only in cases of probable cause. But a mistake in applying the regulations is not *ipso facto* a violation of the Constitution – and absent a definitive pronouncement on the constitutional question by the Supreme Court or the Sixth Circuit, I am not satisfied that the warden's mistake should subject him to personal liability for damages. "In an extraordinary case," *Seiter* teaches it may be possible for the decisions of other courts to provide the clearly established law that is necessary to overcome the defense of qualified immunity. 858 F.2d at 1177. In today's world, unfortunately, the circumstances that led Warden Campbell to order the search at issue here can hardly be considered "extraordinary." I would therefore reverse the order of the district court and direct the entry of summary judgment for Warden Campbell on the ground of qualified immunity.



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No. 91-869

Supreme Court, U.S.
FILED
DEC 27 1991

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In The
Supreme Court of the United States
October Term, 1991

— ♦ —
DONAL CAMPBELL,

Petitioner,

v.

LENORA DAUGHERTY,

Respondent.

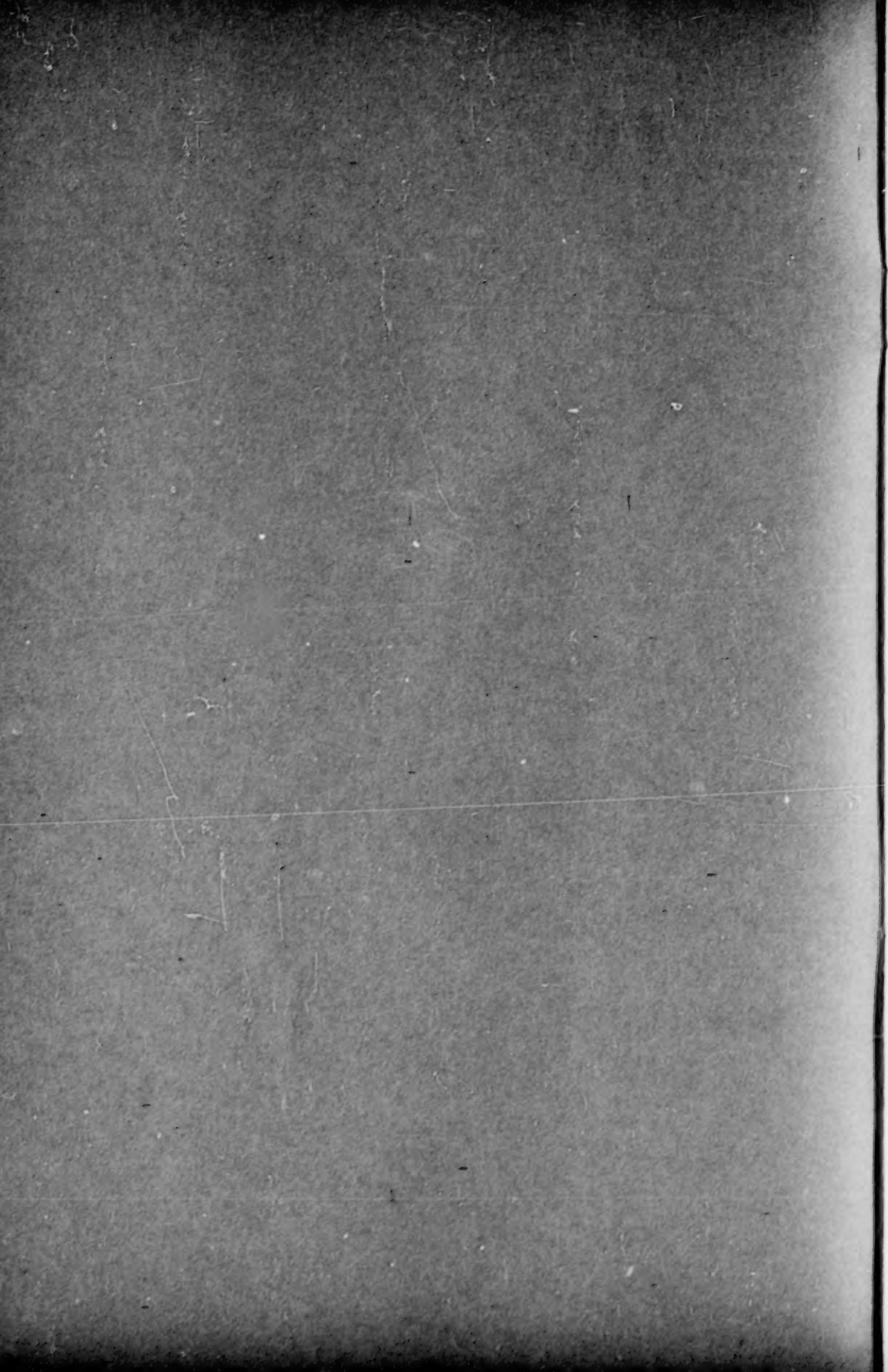
— ♦ —
**Petition For Writ Of Certiorari
To The Sixth Circuit Court Of Appeals**

— ♦ —
**RESPONSE TO PETITION
FOR WRIT OF CERTIORARI**

— ♦ —
JOHN J. HOLLINS, JR.
JAMES L. WEATHERLY, JR.

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QUESTION PRESENTED FOR REVIEW

Whether the respective Circuits have adopted inconsistent standards as to what may be used to determine clearly established law for purposes of qualified immunity?

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JURISDICTION

The respondent, Lenora Daugherty, originally filed this action in the Middle District of Tennessee. On October 28, 1988, the petitioner filed a motion for judgment on the pleadings and a stay of discovery. By order dated November 9, 1988, the Middle District Court for Tennessee referred to all pretrial matters to the Magistrate. Since the Magistrate considered evidence outside of the pleadings, the petitioner's motion to dismiss was treated as a motion for summary judgment. On April 21, 1989, the Magistrate denied the petitioner's motion for summary judgment on the issue of qualified immunity. On June 14, 1989, the District Court affirmed the decision of the Magistrate. On June 10, 1991, the Sixth Circuit affirmed the District Court, and on August 27, 1991, denied the petitioner's petition for a rehearing en banc on August 27, 1991.

- I. **IN OHIO V. SEITER, 859 F.2d 1171 (6TH CIR. 1988), THE SIXTH CIRCUIT ARTICULATED A DEFINITIVE STANDARD TO BE USED IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED FOR PURPOSES OF QUALIFIED IMMUNITY.**

In recent years this Court has attempted to articulate guidelines governing the scope and parameters of qualified immunity for government officials. Those officials performing discretionary functions are shielded from liability from civil damages provided their conduct does not violate clearly established statutory or constitutional rights of which a *reasonable person* would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982) (emphasis

added). In other words, government officials are not entitled to an order of qualified immunity if the plaintiff's rights were so clearly established that when the acts were committed, any officer in the defendant's position, measured objectively, would have clearly understood he was under an affirmative duty to refrain from such conduct. *Garvey v. Jackson*, 845 F.2d 647 (6th Cir. 1988). In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court refined the definition of "clearly established" for purposes of establishing qualified immunity:

It should not be surprising, therefore, that our cases establish that the right of the official that is alleged to have been violated must have been clearly established in the more particularized, and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action and question has been previously held unlawful, *but it is to say that in light of preexisting law the unlawfulness must be apparent.* *Id.* at 640 (emphasis added).

In *Ohio v. Seiter*, 858 F.2d 1171 (6th Cir. 1988), the Sixth Circuit adopted a definitive standard to guide that Court's inquiry into whether a legal rule was "clearly established" for purposes of qualified immunity. *See also Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989). When conducting an inquiry to determine whether a constitutional right was "clearly established," the lower Court focused initially on decisions of this Court, then to decisions of the Sixth Circuit and finally to decisions of other Circuits:

[I]n the ordinary instance, to find a clearly established constitutional right, a District Court must find binding precedent by the Supreme Court, its Court of Appeals, or itself. In an extraordinary case, it may be possible for the decision of other Courts to provide such "clearly established law." However, these decisions must point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the minds of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting. *Id.* at 1177.

After applying the foregoing standard to the facts of this case, the Sixth Circuit held that the law with respect to searches of prison visitors was clearly established in 1988. *Daugherty v. Campbell*, 935 F.2d 780, 787 (6th Cir. 1991). In reaching this decision, the Court relied on a Sixth Circuit slip opinion and Circuit Court cases from three Circuits outside the Sixth Circuit. *Id.* at 784-788.

In *Long v. Norris*, 929 F.2d 1111, 1112-13 (6th Cir. 1991), inmates and prison visitors alleged that their constitutional rights were violated by strip and body cavity searches conducted on visitors without probable cause. The Court held that since the plaintiffs specifically alleged the searches were conducted without a prior determination of "probable cause" and not "reasonable suspicion," the law was not clearly established at the time the searches took place. *Id.* at 1115. However, the Court in *dicta* concluded that precedents from other Circuits had uniformly held that strip searches of prison visitors without a predicate finding of "reasonable suspicion" violated

the Fourth Amendment. Accordingly, the Sixth Circuit opined that searches of prison visitors during 1984 and 1985 without at least a "reasonable suspicion" violated clearly established law because any reasonable officer should have known such searches were unconstitutional. *Id.* at 1116.

In this case the Sixth Circuit further relied on case law from three other Circuits to determine that the law in the area of searches of prison visitors was clearly established. *Daugherty v. Campbell*, 935 F.2d at 785, 787. Specifically, the Court relied on *Hunter v. Auger*, 762 F.2d 668 (8th Cir. 1982), *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985) and *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985). In each case the respective Circuits held that under the facts and circumstances virtually identical to those in this case, searches of prison visitors conducted without any predicate finding of reasonable suspicion violated the visitors' rights under the Fourth Amendment. The Court reasoned that the petitioner's conduct in this case has been held unlawful by every Circuit that has considered this very issue since 1982. *Daugherty v. Campbell*, 935 F.2d at 787. Accordingly, the Sixth Circuit held that the prison visitor cases from the other respective Circuits were similar enough to "merit reasonable reliance upon them." *Id.*

In his brief the petitioner alleges that there is a conflict among the respective Circuits as to whether Circuit Court opinions from other Circuits may be utilized in determining clearly established law for purposes of qualified immunity. (See Brief of Petitioner at p. 8-9). The petitioner has cited opinions from seven different Circuits as authority for his position. However, a closer examination of those decisions reveals that none of the respective

Circuits has adopted definitive standards to be used in determining clearly established law which in any way contradicts the guidelines adopted by the Sixth Circuit in *Ohio v. Seiter, supra*.

In *Robinson v. Bibb*, 840 F.2d 349 (6th Cir. 1988), the Sixth Circuit held that a police officer was not entitled to qualified immunity in that case. Although the Court applied a different standard than that articulated in *Ohio v. Seiter, supra*, it should be borne in mind that the *Bibb* decision was decided prior to the *Seiter* opinion. Accordingly, any deviation from *Ohio v. Seiter, supra* by the Sixth Circuit in *Robinson v. Bibb, supra* has likely been overruled.

In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984) the plaintiffs alleged that various F.B.I. agents violated their First Amendment rights to peacefully protest the Vietnam War. *Id.* at p. 8-13. Notwithstanding the fact that the D.C. Circuit posed the rhetorical question of uncertainty as to what standard should be applied to determine well established rights in light of *Harlow v. Fitzgerald, supra*, the Sixth Circuit held that the illegality of the conduct in that case was well established "by any reasonable definition" of "clearly established." *Id.* at 26. Accordingly, the D.C. Circuit declined to define what constituted "well established" law in that Circuit. *Id.* See also *Zweibon v. Mitchell*, 720 F.2d 162, 169 (D.C. Cir. 1983) wherein the D.C. Circuit declined to define what constitutes "well established" law because the illegal conduct in that case was not clearly established by any reasonable definition of the phrase.

The petitioner is also relying on decisions from the First, Fourth and Tenth Circuits which held that certain novel substantive rights advanced by the plaintiffs in the respective cases were not clearly established due to the inconsistent approaches taken by Circuits. In *Knight v. Mills*, 836 F.2d 659 (1st Cir. 1987), a psychiatric patient alleged that the defendants violated her Constitutional rights by failing to provide her with psychological treatment while committed. *Id.* at 428-29. Since neither this Court nor the First Circuit had addressed that issue, the Court examined the factual circumstances and holdings of two cases outside of the Circuit. See *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977) and *Ohlinger v. Watson*, 652 F.2d 775 (9th Cir. 1980). The Court concluded that the two Circuit Court cases addressed factual scenarios distinguishable from the circumstances of the case at issue. *Knight v. Mills*, 886 F.2d at 668-9. Accordingly, the Court held that the law regarding psychological treatment for mental patients was not clearly established at the time of the search. *Id.*

In *Hilliard v. City and County of Denver*, 930 F.2d 1516, 1517 (10th Cir. 1991), the plaintiff alleged that the defendant police officers violated her constitutional rights by leaving her stranded in a high crime area where she was robbed and sexually assaulted. Since this Court had not addressed this specific issue, the Tenth Circuit analyzed two Circuit Court opinions from the Seventh and Ninth Circuits. See *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), *Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988). After examining the factual circumstances and legal holdings of the two opinions, the Tenth Circuit concluded that the state of the law in that particular area was not clear

enough to merit reasonable reliance to create "clearly established" rights. *Id.* at 1520-1521.

Apparently, the petitioner has cited *Knight v. Mills*, *supra*, and *Hilliard v. City and County of Denver*, *supra*, for the proposition that the First and Tenth Circuits have adopted definitive standards which foreclose reliance on Circuit Court opinions outside of their own to determine clearly established law. It should be pointed out that in both cases the respective Courts chose not to rely on other Circuit Court opinions because the opinions were factually distinguishable. Furthermore, the respective Circuits had utilized inconsistent approaches in defining the existence of legitimate constitutional rights. The petitioner has cited none and the respondents are not aware of any Circuit Court cases that have absolutely foreclosed the possibility of relying on other Circuit Court definitions of clearly established law. Accordingly, the decisions by the First and Tenth Circuits to reject esoteric or inconsistent substantive case law from other Circuits should not be construed by this Court as a refusal by those Circuits to look to other Circuits under different circumstances.

Finally, in *Wallace v. King*, 626 F.2d 1157, 1158 (4th Cir. 1980) plaintiffs alleged that several police officers conducted a warrantless search of their home in violation of their Fourth Amendment rights. The Court concluded that the cases from other Circuits that had addressed this very issue had not been uniform in their analysis of the underlying substantive law. *Id.* at 1161. Thus, the Fourth Circuit held that in 1976 the law with respect to warrantless searches of residences was not clearly established for purposes of qualified immunity. In *dicta* the Court stated

that law enforcement official should not be held liable for money damages where definitive authority had not been decided by this Court, the appropriate Circuit Court or the highest Court of the State. However, *Wallace v. King* is a 1980 opinion involving 1976 events which was decided prior to *Harlow v. Fitzgerald*, *supra*, and its progeny. Therefore, this Court should view the foregoing *dicta* with caution.

Like the Sixth Circuit in the instant case, the petitioner has also cited decisions from Seventh and Ninth Circuits which chose to rely on other Circuit decisions in determining that the law was clearly established for purposes of qualified immunity. In *Johnson/El v. Schoemehl*, 878 F.2d 1043, 1052-53 (8th Cir. 1989), the Eight Circuit held that the law was clearly established regarding the conditions and confinement for pretrial detainees. In reaching its decision the Court rejected the Defendant's argument that the Court may not rely on decisions of other Circuits to find clearly established law:

They argue that for the law to be clearly established, the specific acts of these officials must be particularly prescribed by decisions rendered by this Circuit or another Court with direct jurisdiction over the institution. This rule would enable jail officials to claim immunity where several other Circuit, District, or State Courts had condemned similar practices on the basis of the Federal Constitution. . . . While the identity of a Court and its geographical proximity may be relevant in determining whether a reasonable official would be aware of the law . . . , we do not think the defendants' per se rule adequately captures what the Supreme Court has meant by

its objective tests for what is "clearly established." *Harlow v. Fitzgerald*, *supra*, (citation omitted). *Id.* at 1049.

Accordingly, the Eighth Circuit held that the case law rendered by the various Circuits merited reasonable reliance sufficient to establish that the law with respect to the confinement of pretrial detainees was clearly established. *Id.* at 1053.

In *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 432 (7th Cir. 1989), the Seventh Circuit held that the law with respect to the medical treatment of inmates was clearly established in 1975. In reaching its decision, the Court relied on three Circuit Court opinions outside of the Seventh Circuit. *See Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974), *Bishop v. Stoneman*, 508 F.2d 1224 (2nd Cir. 1974) and *Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974). Since the Seventh Circuit had not addressed that issue, the Court concluded that the factual background and the holdings of the respective cases merited reasonable reliance to establish a clearly established right.

It cannot be disputed that the petitioner has cited the foregoing authorities for the proposition that the Circuits have developed inconsistent and conflicting standards with respect to what case law may be used to determine clearly established law for purposes of qualified immunity. A careful analysis of the factual background and the holdings of these cases reveals that there is no conflict in the Circuits on the issue. The cases cited by the petitioner actually support the respondent's position. In each instance, the Courts looked to the other Circuits for guidance, even though they found nothing they felt to be

controlling. None of the cases cited by the petitioner contains a definitive standard which absolutely forecloses the possibility of relying on case law from other Circuits. The petitioners have merely cited Circuit decisions where- in, the respective Courts *chose* not to rely on authority from other Circuits in determining clearly established law. (emphasis added.) Any refusal to rely on case law from other Circuits by the authorities cited herein should not be construed by this Court as creating conflicting or inconsistent guidelines between the Circuits. Accordingly, the respondent submits that there is no conflict in the Circuits on this issue and the defendant's petition for certiorari should be denied.

II. THE SIXTH CIRCUIT HOLDING IN *DAUGHERTY V. CAMPBELL*, 935 F.2d 780 (6TH CIR. 1991) THAT THE LAW WITH RESPECT TO SEARCHES OF PRISON VISITORS WAS CLEARLY ESTABLISHED IN JANUARY OF 1988 IS CORRECT AND CONSISTENT WITH EACH CIRCUIT THAT HAS ADDRESSED THE ISSUE.

In *Ohio v. Seiter, supra*, the Sixth Circuit adopted definitive parameters to guide any future inquiry into whether a legal rule was "clearly established" for qualified immunity. In the instant case, the Sixth Circuit applied the foregoing standard in reaching its conclusion that the law in this case was clearly established at the time of the petitioner's conduct. *Daugherty v. Campbell*, 935 F.2d 780, 787 (6th Cir. 1991). The Court relied on one District Court slip opinion and three Circuit Court opinions rendered outside of the Sixth Circuit. In *Long v.*

Norris, supra, the Sixth Circuit addressed a factual scenario very similar to the one presented in this case. In *dicta*, the Court concluded that as early as 1984 prison visitors possessed a Fourth Amendment right to be free from unreasonable searches and seizures. Specifically, the Court held that searches of prison visitors may not be conducted consistent with the Fourth Amendment unless a public official had a "reasonable suspicion" that the visitor possessed contraband. *Id.* at 116. Accordingly, the Sixth Circuit concluded that as early as 1984 the law with respect to searches of prison visitors was clearly established. *Id.*

In 1982 the Eighth Circuit in *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982), rendered its landmark decision with respect to the rights of prison visitors against unreasonable searches and seizures. Under virtually identical facts and circumstances as this case, the plaintiff in *Hunter* was ordered to undergo a visual body cavity search before being permitted a visit. These searches occurred in 1978, ten years prior to the official action in this case. The Eighth Circuit held that the Fourth Amendment mandated that a "reasonable suspicion" standard be adopted to govern strip searches of all prison visitors. *Id.* at 674.

By January of 1988, the Sixth Circuit acknowledged that three different Circuits had addressed the issue of qualified immunity of government officials in the context of searches of prison visitors. *Daugherty v. Campbell*, 935 F.2d at 785-787. In *Smothers v. Gibson*, 778 F.2d 470 (8th Cir. 1985), the plaintiff was ordered to undergo strip searches on seven occasions between December of 1981 and January of 1982. As in this case, the search was based on an alleged uncorroborated informant's tip that the

visitor would be bringing contraband into the facility. Following the mandate of *Hunter*, the Eighth Circuit held that the strip search should have been based on a finding of "reasonable suspicion" before the search would be constitutionally permissible. *Id.* at 472. The Court rejected the defendants' qualified immunity argument and held that the law had been clearly established in this particular area as early as 1981. *Id.* at 473.

The First Circuit in *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), held that a policy requiring all prison visitors to be strip searched without any individualized suspicion clearly violated the Fourth Amendment. In that case, the plaintiff was ordered to submit to strip searches on three occasions in 1977, eleven years before the events in this case. Following the mandate of *Hunter v. Auger*, *supra*, the Court held that the policy violated the plaintiff's Fourth Amendment rights and a predicate finding of a "reasonable suspicion" was necessary before the strip search could be lawfully conducted. *Id.* at 564-566.

Finally, in *Thorne v. Jones*, 756 F.2d 1270 (5th Cir. 1985), the Fifth Circuit held that a 1977 strip search of a prison visitor without a finding of "reasonable suspicion" violated the Fourth Amendment. Although, the Court unequivocally recognized the unconstitutionality of the officials' conduct, the Fifth Circuit held that the defendant officials were entitled to qualified immunity. *Id.* at 1277. However, in 1977, only one District Court had addressed this issue. See *Black v. Amico*, 387 F.Supp 88 (W.D.N.Y. 1974). In the instant case, the Sixth Circuit held that the facts and the circumstances of the *Thorne v. Jones* *supra*, case were distinguishable. *Daugherty v. Campbell*, *supra*, at 786-87. At the time the search took place in the

instant case, each Circuit that has addressed this issue has acknowledged the unlawfulness of the conduct of the state officials under facts and circumstances virtually identical to those presented here. *Id.* Accordingly, the Sixth Circuit concluded that in January 1988, the case law in the area of strip searches of prison visitors provided "an authoritative, 'clearly established' rule forewarning the defendants . . . on the pain of personal liability." (citation omitted) *Daugherty v. Campbell*, 935 F.2d at 786-87.

The petitioner argues that in January of 1988 he was faced with a maze of inconsistent legal decisions on the issue of searches of prison visitors. (See Brief of petitioner at page 10.) Apparently, the petitioner is ignoring the litany of cases relied on by the Sixth Circuit which unequivocally hold that before a search of a prison visitor will pass constitutional muster, the official must make an affirmative finding of "reasonable suspicion" that the visitor possesses contraband. The "reasonable suspicion" standard or some minor variation has become the touchstone of every circuit that has addressed this issue. Undoubtedly, each Circuit that has followed the mandate of *Hunter v. Auger*, *supra* has pointed unmistakably to the minimum constitutional requisites involved in a search of a prison visitor.

It is axiomatic that the respondent is not attempting to rely on a single idiosyncratic opinion or a handful of novel decisions of other Circuit or District Courts in an attempt to create some abstract constitutional right. See *Eugene D. v. Karmen*, 889 F.2d 701 (6th Cir. 1989) and *Davis v. Holley*, 835 F.2d 1175 (6th Cir. 1987). The case law that has evolved from the Circuits has established a bright

line rule to enable government officials to establish prison visitor guidelines consistent with the Fourth Amendment.

In this case, the very conduct in question has been held unlawful by every Circuit addressing the issue since 1982. The respondent is hard pressed to accept the petitioner's argument that a reasonable official the petitioner's position would not be aware of the existence of the controlling case law on this issue. Accordingly, the respondent submits that the Sixth Circuit's opinion in this case is consistent with the prior pronouncements of the other Circuit Court decisions on the issue of qualified immunity with respect to searches of prison visitors.

III. THE PETITIONER, WARDEN, VIOLATED STATE REGULATIONS EMBODIED IN THE TENNESSEE DEPARTMENT OF CORRECTIONS' GUIDELINES REGARDING STRIP SEARCHES OF PRISON VISITORS, WHICH REGULATIONS HAD BEEN ADOPTED BY THE PETITIONER PERSONALLY FOR HIS INSTITUTION.

In 1982 the Tennessee Department of Corrections established guidelines governing the searches of visitors to penal institutions. *Daugherty v. Campbell*, 935 F.2d 780-81 (6th Cir. 1991). Pursuant to the regulations, a visual body cavity search of a prison visitor may only be conducted upon a finding of *probable cause* to believe the visitor is concealing contraband prior to conducting the search. (emphasis added). *Id.* On July 22, 1986, the petitioner Campbell who was the warden of the Turney Center Correctional Facility personally signed and approved

the Department's 1982 guidelines. *Id.* Specifically, a finding of *probable cause* must be made before a visual body cavity search may be conducted at the facility. *Id.* at 781, n.2 (emphasis added). The "probable cause" standard is a higher standard than the "reasonable suspicion" standard.

In *Spruytte v. Walters*, 753 F.2d 98 (6th Cir. 1985) the Sixth Circuit held that a violation of clearly established state or administrative regulation provided sufficient proof to defeat an official's claim of qualified immunity. As in *Spruytte v. Walters*, *supra*, the petitioner has violated the same state regulation that created the plaintiff's constitutionally protected interests. In January of 1988, the regulations governing strip searches at the Turney Center Correctional Facility were in full force. At a minimum the petitioner should have been on notice of the minimum requirements of the "reasonable suspicion" standard that had evolved from *Hunter v. Auger*, and its progeny. Accordingly, any argument by the defendant that a reasonable person in his position would not have been aware of the constitutional standards governing the search of prison visitors in 1988 is almost inconceivable.

CONCLUSION

In *Ohio v. Seiter*, 858 F.2d 1171 (6th Cir. 1988), the Sixth Circuit adopted a definitive standard to guide that Court's inquiry into whether a legal rule was "clearly established" for purposes of qualified immunity of public officials. The Sixth Circuit in this case concluded that the law with respect to searches of prison visitors was

"clearly established" in 1988. In reaching its decision, the Court relied on a Sixth Circuit District Court opinion and three Circuit Court cases from outside the Sixth Circuit.

In his brief, the petitioner alleges that there is a conflict among the Circuits as to whether a Circuit Court may rely on opinions for other Circuits to determine clearly established law. However, an examination of the authorities cited by the petitioner reveals that none of Circuits has adopted definitive standards which in any way contradict the guidelines adopted by the Sixth Circuit in *Ohio v. Seiter*, 858 F.2d 1171. The petitioner has cited none and the respondent is not aware of any Circuit Court cases which absolutely foreclose the possibility of relying on other Circuit Court opinions to define "clearly established" law. Thus, the refusal by the Circuit Courts in those cases to rely on opinions outside of their Circuit should not be construed as an adoption of a standard inconsistent with that of the Sixth Circuit.

In this case the Sixth Circuit's holding that the law with respect to searches of prison visitors was clearly established is consistent with every Circuit that has addressed the issue. The petitioner argues that in January of 1988 he was faced with a series of inconsistent decisions on the issue of the standard to be adopted to searches of prison visitors. Apparently, the petitioner is ignoring the progression of the case law adopting the standard of reasonable suspicion or some minor variation.

The conduct at issue in this case has been held unlawful by every Circuit that has addressed the issue

since 1982. Thus, the petitioner's argument that a reasonable official in his position would not be aware of the existence of these rights appears untenable. The unreasonableness of the petitioner's argument is magnified by the fact that he violated Tennessee Department of Corrections guidelines governing searches of prison visitors that he personally approved in 1986. Accordingly, the respondent submits that the Sixth Circuit decision in this case is consistent with prior pronouncements from other Circuit Court decisions upon this issue and that the petitioner's writ of certiorari should be denied.

Respectfully submitted,

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No. 91-869

Supreme Court, U.S.
FILED

DEC 23 1991

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In The
Supreme Court of the United States

October Term, 1991

DONAL CAMPBELL,

Petitioner,

v.

LENORA DAUGHERTY,

Respondent.

Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LENORA DAUGHERTY)	
Plaintiff)	
)	No. 3:88-0480
v.)	Judge Nixon
DONAL CAMPBELL, et al.)	
Defendants)	

REPORT AND RECOMMENDATION

I. INTRODUCTION

This action was referred to the Magistrate by the Honorable John T. Nixon, District Judge, by Order dated November 28, 1988. The Magistrate was directed to determine any pretrial matters arising in this action pursuant to 28 U.S.C. § 636 (b)(1)(A) and (B). Plaintiff Lenora Daugherty (hereinafter "Daugherty") brings this action under 42 U.S.C. § 1983 against the following defendants: Donal Campbell, Warden, Turney Center Correctional Facility (hereinafter "Turney Center"), a state correctional facility; Alton R. Hesson (hereinafter "Hesson"), Assistant Warden for Security at Turney Center; Robert W. Starbuck, administrative sergeant for security; Brenda G. Funderburk, correctional officer; Rita A. Starbuck, a nurse at Turney Center; Kevin W. Daniels, correctional officer, and Bobby L. Chessor, a correctional officer. Daugherty's claims against these defendants arise out of a visual cavity search of her and a search of her vehicle prior to her visit with her husband who is incarcerated at

Turney Center. Daugherty asserts that these searches violated her Fourth Amendment right against unreasonable searches and seizures for which she seeks damages.

The defendant Campbell moves for summary judgment upon the grounds that he is entitled to qualified immunity from this damages suit because Daugherty's alleged Fourth Amendment right was not clearly established at the time of the searches at issue and thus this § 1983 damage action can not be maintained. (See Docket Entry No. 24.) The defendant Campbell also seeks a stay of discovery pending resolution of this motion. The defendant Robert W. Starbuck moves to dismiss or in the alternative for summary judgment stating in essence upon a factual showing that he was not present at Turney Center on the dates in question and thus had no personal involvement in the searches of Daugherty or her vehicle. (See Docket Entry No. 26 and attachments thereto.)

II. ANALYSIS OF THE MOTIONS

A. The Defendant Campbell's Motion

1. Analysis of the Complaint

According to the allegations in her complaint, Daugherty began her visits with her husband, a state inmate at the Turney Center on September 30, 1986 and continued to visit until January 16, 1988. (Docket Entry No. 1, p. 3, ¶ 11.) At some time prior to her planned January 16, 1988 visit, the defendant Campbell allegedly ordered correctional personnel to conduct a search of Daugherty's vehicle and to strip search her person for

S.A. 3

possession of narcotics prior to any visit with her husband. When Daugherty arrived on the prison grounds, the defendant Hesson directed that the defendants Funderburk, a correctional officer, and Rita A. Starbuck, a nurse conduct the visual cavity search of Daugherty. Daugherty was ordered to undress and to turn around twice (*Id.* at p. 6) where she was required to expose herself for a frontal and rear area visual body cavity search.

After the search of Daugherty's person, there was another search of her vehicle. The search of Daugherty's vehicle was requested earlier, but was delayed due to the fact that her keys had been locked in the trunk of her truck. *Id.* at p. 6. After these searches, the defendant Daniels instructed Daugherty to sign a consent form to the searches before she would be permitted to visit her husband.

According to the regulations of the Tennessee Department of Correction, searches of visitors are subject to the following requirements:

V. POLICY. When there is probable cause to believe that an individual may be concealing in a body orifice contraband that would threaten the security of the institution or its personnel, the Warden/Director, or designated representative, may authorize the manual search of a body cavity. (See Policy #506.06 Searches)

VI. PROCEDURE:

A. Probable Cause for Search

A body cavity search of an inmate/student, visitor, or staff member shall only be

initiated when there is probable cause to believe that the individual has concealed contraband within a body cavity or orifice. Probable cause may be established from the following evidence:

1. Confidential information from a reliable source.
2. Irregularities found in the area of body cavities during an unclothed body search.
3. Observed actions or behavior resulting in reasonable cause to believe that the individual has contraband concealed in a body cavity.
4. Detection of contraband on the person of an inmate/student's visitor after physical contact, and with reasonable cause to believe the visitor's possession of contraband was for the purpose of smuggling it in or out of the institution.
5. Any other reasonable cause to believe that an inmate/student has contraband concealed in a body cavity. (Emphasis added.)

(See Docket Entry No. 37 and attachments thereto.)

2. Conclusions of Law

If a constitutional right were not clearly established at the time of the alleged violation, then the doctrine of qualified immunity constitutes a complete bar to any award of damages and the maintenance of any such action. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86

L.Ed.2d 411 (1985). The § 1983 plaintiff who seeks damages must show that the legal right was clearly established *at the time of the violation*. *Mitchell v. Forsyth, supra*. As the Supreme Court stated in an earlier decision:

... we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Citation omitted].

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, [footnote omitted] should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. [footnote omitted]. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and

can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors. (Emphasis added.)

Harlow v. Fitzgerald, 457 U.S. 800, 817-19, 73 L.Ed.2d 396, 410-11, 102 S.Ct. 2727 (1982).

The Supreme Court also explained that "[b]ecause they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot be characterized as being in good faith' [citing *Wood v. Strickland*, 420 U.S. at 322, 43 L.Ed.2d 214, 95 S.Ct. 992]." *Procunier v. Navarette*, 434 U.S. at 565, 55 L.Ed.2d at 33, 98 S.Ct. 855.

In determining whether the right at issue was clearly established at the time of the disputed acts, the Court of Appeals for the Sixth Circuit stated that the District Court must look to the decisions of the Supreme Court, Courts of Appeal, and the highest court of the state. *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988), *reh. den.*, *Robinson v. Bibb*, No. 8292 (6th Cir. 1988). In a more recent decision, the Court of Appeals defined the district court's responsibility on qualified immunity as follows:

Our review of the Supreme Court's decisions and of our own precedent leads us to conclude that, in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its Court of Appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. The decisions of other courts to provide such 'clearly established law' these

decisions must point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave to doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting. Here a mere handful of decisions of other circuits and district courts, which are admittedly novel, can not form the basis for a clearly established right in this circuit. (Emphasis added.)

Ohio v. Seiter, 858 F.2d 1171, 1177-78 (6th Cir. 1988).

The defendant Campbell cites two decisions in which Courts of Appeals have applied the qualified immunity doctrine to bar an action for an alleged violation of a prison visitor's Fourth Amendment rights because of the lack of probable cause. In those decisions, the courts found that there was no clearly established Fourth Amendment right of prison visitors to be subject to searches upon these prison official's [sic] request. *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985) *cert. den.*, *Jones v. Thorne*, 475 U.S. 1016, 106 S.Ct. 1198, 89 L.Ed.2d 313 (1986) and *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2nd Cir. 1984). However, Daugherty cites several Court of Appeals decisions that recognize a Fourth Amendment right for visitors not to be subjected to searches absent some reasonable suspicion. See *Smothers v. Gibson*, 778 F.2d 470, 473 (8th Cir. 1985); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Doe v. Renfrow*, 631 F.2d 91, 92 (7th Cir. 1980); *United States v. Kallerig*, 534 F.2d 411, 413 (1st Cir. 1976) *cert denied*, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981); *Black v.*

Amico, 387 F.Supp. 88, 91 (W.D. N.Y. 1974). The Magistrate notes that in 1986 this Magistrate found that such a Fourth Amendment right existed for a TDOC prison visitor who was requested to submit to a cavity search. See *Mills v. Norris*, No. 3:86-0005, Order filed April 1, 1986.

It is noteworthy that in *Smothers*, the Court of Appeals observed in a prisoner visitors' Fourth Amendment claim that: "It can not be denied that [the prison visitor] had, in 1981, a 'clearly established fourth amendment right to be free of unreasonable searches.'" *Smothers*, 778 F.2d at 473. Further, in *Blackburn*, the Court observed that: "It can hardly be debated that [a prison visitor] had, in 1977, a 'clearly established' Fourth Amendment right to be free of unreasonable searches. No court has intimated then, as no court has intimated today, that citizens who visit a penal institution forfeit the protections presumptively accorded them by the Bill of Rights. Indeed the Supreme Court has made it clear that no 'iron curtain' separates prisons from the reach of the Constitution." *Blackburn*, 771 F.2d at 569. While there were variations among these decisions in the standard of Fourth Amendment protection, the Court in *Blackburn* observed that the only difference was "to refine the issue of how much suspicion is required." *Id.* at 570. The magistrate also observes that the TDOC regulations at issue appear to reflect the constitutional standards of these cases by requiring a reasonable suspicion and probable cause prior to authorization of a search of a prison visitor. The two decisions, *Thorne* and *Carey*, that are relied upon by the defendant Campbell do not preclude a finding of a clearly established right in January, 1988, the time of the searches at issue. The Magistrate finds that those decisions were back in 1984 and 1985, respectively. Whatever

may have been true in 1984 and 1985 in those circuits about the Fourth Amendment rights asserted here in 1988, it is clear, at least to the Magistrate, that those decisions reaffirmed the existing decisional law in other circuits that there is such a Fourth Amendment right for visitors. Those decisions add characterization that Daugherty's right as a prison visitor to be protected by the Fourth Amendment was clearly established in January, 1988.

Accordingly, the Magistrate concludes that Daugherty had a clearly established right as a prison visitor to be free of any search of her person absent some reasonable suspicion by a prison official.¹

B. Defendant Robert Starbuck's Motion

The defendant Robert Starbuck has submitted his answers to interrogatories concerning the search of Daugherty in which he stated "I have no direct personal knowledge of the search of plaintiff's person or vehicle because I was not on duty on January 16, 1988. It is my understanding that the body cavity search was conducted by Officer Brenda Funderburk and was witnessed by

¹ The magistrate notes in this regard that Daugherty does not argue that these TDOC regulations create any liberty interest under the Fourteenth Amendment. Therefore, the Magistrate deems that the probable cause standard set forth in the TDOC regulation is not the legal standard to evaluate the defendant's conduct. Rather, the Fourth Amendment standard is the lesser reasonable suspicion standard that is common to all decisional law under the decisions cited *supra*.

L.P.N. Rita Starbuck. The vehicle search to my understanding was conducted by Lieutenant Bobby Chessor and Corporal Kevin Daniels. I have no knowledge of who signed or authorized the search order." (See Docket Entry No. 27, Exhibit B thereto, p. 4.)

As to the defendant Robert Starbuck's motion for summary judgment, the Magistrate recommends that it be granted. Personal involvement in the alleged constitutional violation is necessary to establish liability. See *Polk County v. Dodson*, 454 U.S. 312, 325, 70 L.Ed.2d 209, 521, 102 S.Ct. 355 (1981); *Bellamy v. Bradley*, 729 F.2d 416, 1401 (6th Cir. 1984).

IV. RECOMMENDATIONS

For the reasons set forth above, the Magistrate recommends that the defendant Campbell's motion for summary judgment be denied, but that the defendant Robert Starbuck's motion summary judgment be granted. Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objection filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S.Ct. 466 (1985).

Entered this the 20th day of April, 1989.

S.A. 11

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LENORA DAUGHERTY)
) DOCKET NO. 3-88-480
VS.)
)
DONAL CAMPBELL)

ORDER

(Filed June 15, 1989)

The Court is in receipt of the Report and Recommendation of the Magistrate for the above styled action. The Court ADOPTS the Magistrate's Report and Recommendation pertaining to defendant Starbuck. Thus, the claim against defendant Starbuck is dismissed.

The Court ADOPTS the Report and Recommendation regarding defendant Campbell in respect to the strip search issue. However, the Court respectfully requests that the Magistrate separately address the issue of plaintiff's automobile. Thus, the Court DENIES defendant Campbell's summary judgment motion in respect to the strip search issue and reserves judgment on the automobile search issue pending a report and recommendation by the Magistrate.

Entered this the 14th day of June, 1989.

/s/ John T. Nixon
UNITED STATES
DISTRICT JUDGE

